No. 16394

United States
COURT OF APPEALS
for the Ninth Circuit

MAYFLOWER INSURANCE EXCHANGE,

Appellant,

vs.

ROBERT DEAN GILMONT, ROSE MARIE GILMONT and RONALD A. WATSON, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor and Norman I. Gilmont, a minor,

Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE WILLIAM G. EAST, District Judge.

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APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE WILLIAM G. EAST, District Judge.

BASIS OF JURISDICTION

This action was commenced in the United States District Court for the District of Oregon by appellant pursuant to the remedy created by 28 U.S.C.A. 2201, 2202, for a declaration of the rights and liabilities of the parties arising out of a policy of insurance issued

by appellant to defendant McKinzie as of April 16, 1957. The appellees Gilmont are persons who were injured in an automobile accident on June 8, 1957, which involved an automobile in which they were riding and an automobile being operated by defendant McKinzie.

The jurisdiction of the District Court was based on diversity of citizenship under the provisions of 28 U.S.C.A. 1332 in that appellant is an unincorporated association organized under the laws of the State of Washington as a reciprocal or inter-insurance exchange and all of the defendants are citizens of the State of Oregon. The amount in controversy, exclusive of interest and costs, exceeds $3,000.00 (R. 19).

Appellant has appealed from the final judgment of the District Court (R. 56).

This court acquired jurisdiction under the provisions of 28 U.S.C.A. 1291, 1294.

STATEMENT OF THE CASE

The appellant, Mayflower Insurance Exchange, an unincorporated association organized under the laws of the State of Washington as a reciprocal or inter-insurance exchange and duly licensed to transact an insurance business in the State of Oregon, brought this action pursuant to the Federal Declaratory Judgment Act (28 U.S.C.A. 2201, 2202) to determine what liabilities, if any, existed by virtue of an automobile liability policy issued by appellant to the defendant McKinzie.

The policy was issued as of April 16, 1957, based upon an application taken on that date by appellant's local soliciting agent at Portland, Oregon. On June 8, 1957, the defendant McKinzie, while driving his automobile, collided with an automobile being driven by appellee Robert Dean Gilmont, in which car appellees Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman I. Gilmont, were riding as passengers.

The appellant contends that the policy was void *ab initio* because of specific false and fraudulent representations which were made by defendant McKinzie at the time he applied for the policy.

All of the defendants, including defendant McKinzie, were duly served with summons and complaint by the U. S. Marshal within the jurisdiction of the United States District Court for the District of Oregon. While the defendant McKinzie never made any appearance in this action, nonetheless his deposition was taken upon appellant's motion and at that time the attorney for the appellees was present and conducted a thorough cross examination of defendant McKinzie.

The appellees filed an amended answer in which a variety of defenses were set up. The main defenses set forth in the amended answer of appellees Gilmont were based upon theories of estoppel, waiver and laches. During the course of the trial these defenses were withdrawn from the case by the court and at the close of the trial the case was submitted to the jury on instructions that

its verdict must be in favor of appellees if it found that appellant had failed to prove all the elements of actionable fraud entitling recission, or that appellant acted negligently in taking the application from defendant McKinzie.

The jury returned its verdict in favor of appellees Gilmont (R. 44). Subsequent to the filing of the verdict and prior to the entry of judgment an order of default was entered against defendant McKinzie (R. 49).

Judgment was entered for appellees Gilmont declaring the policy of insurance to be in full force and effect and binding on the appellant so as to provide coverage for the accident of June 8, 1957 (R. 52).

Appellant's motion for judgment n.o.v., or in the alternative for a new trial, was denied and appellant thereafter filed its notice of appeal (R. 56).

SPECIFICATION OF ERRORS

1. The trial court erred in denying appellant's motion for a directed verdict.

This motion was based on the grounds that appellant had conclusively proved all the elements of fraud entitling it to rescind the insurance policy, that there was no evidence of any sort or nature to the contrary, that there was no evidence of any sort or nature which would justify a verdict in favor of appellees and against appellant, and that there were no issues of any sort or nature to be submitted to the jury. (R. 268-272, 278-279)

2. The trial court erred in denying appellant's motion to set aside the verdict heretofore received and filed and for the entry of judgment in favor of appellant n.o.v.

This motion was based on the grounds that there was no evidence that appellant was negligent in completing the application for insurance from defendant McKinzie, that there was no evidence which would authorize a jury to return a verdict against appellant, and that the evidence was uncontradicted and conclusively proved that defendant McKinzie intentionally made a false and material representation for the purpose of inducing the appellant to issue its automobile policy and that appellant had acted in reliance thereon and had suffered injury (R. 44-45).

3. The trial court erred in denying appellant's motion for a new trial.

This motion was based on the grounds that the verdict was against an overwhelming weight of evidence, was based upon the court's instruction that they could find for defendant on either one of two theories, one of which would not support a recovery under the facts, that no judgment could be rendered in favor of appellees since they had no greater right than defendant McKinzie, who had defaulted, that there is no evidence from which the jury could find that appellant was negligent in completing the application for insurance, and that the evidence conclusively proved that appellant was entitled to a verdict on the grounds of fraudulent representations on the part of defendant McKinzie (R. 44-46).

4. The trial court erred in failing to give appellant's requested instruction No. 2 reading as follows:

> "Defendants Gilmont have contended and set up by way of defense to this action that plaintiff was negligent in obtaining and completing the application for insurance from defendant Arthur Allen McKinzie. You are instructed that there is no evidence from which you could find that plaintiff was negligent in obtaining and completing the application for insurance from defendant McKinzie and you will therefore completely disregard this contention and defense in determining this case." (R. 43)

and appellant duly made its objection thereto as follows:

> "We object and except to the failure of the Court to give the plaintiff's requested instructions.
>
> The Court: Which one is that?
>
> Mr. Vosburg: Your Honor, I don't believe you have given any of ours.
>
> The Court: Well, there is one I gave part of, but not in your form, Number 1, defendant failed to truthfully disclose his answers to the questions. I think that was covered. I didn't give it in your form. But I think it was covered. Number 2 was taken from the jury . . . You conceded that number 10 was covered by defendants' instruction. (266) And I refused to give defendants' number 11. You may have your objections.
>
> Mr. Vosburg: May I call your Honor's attention when you say they were taken from the jury, our instructions, I think 2, 3, 4 and 5, those are the ones which your Honor has ruled here during the course of argument there was no evidence to sustain the submission to the jury. I don't think your Honor specifically has withdrawn them from the jury except by inference, and the reason I am calling this to your Honor's attention is, there has

been introduced as evidence, and I assume will be submitted to the jury, this amended and supplemental answer of the defendants which sets out all of these other so-called alleged defenses, which you have withdrawn. I just call that to your Honor's attention. The jury may be misled." (R. 299-300)

5. The trial court erred in instructing the jury as follows:

"Now members of the jury, there is a second issue which is raised by the contention of the defendants Gilmont as to whether or not the agent at the time he took the answers from McKinzie acted with ordinary, reasonable care for the protection of his own company, and in that connection you are charged that the defendants Gilmont have charged that the plaintiff, acting through the agent who took the application, was careless and negligent in obtaining and completing the application of insurance from McKinzie.

"You are instructed, members of the jury, that negligence as ordinarily defined, is a failure to do that which an ordinary, reasonable prudent person would do under the same or similar circumstances, or doing that which an ordinarily reasonable prudent person would not do under the same or similar circumstances.

"Therefore, if you should find from the evidence that the plaintiff, acting through its agent, was careless and did not act as a reasonably prudent person, being an insurance company, in obtaining the answers from McKinzie while filling out the application for insurance by Mr. McKinzie, and thereby blindly or recklessly put down defendant's answers to the question without reasonable credulence, you should then find that the plaintiff is not entitled to be relieved of obligation under its policy because then through such action

and conduct he would have been, become a party to the transaction.

"However, if you find that the plaintiff's agent while taking down the answers acted reasonably in accepting the answers given to him by McKinzie, then McKinzie is bound by his own doings as you shall find them from all of the evidence in the case subject to these instructions." (R. 66-67, 294-295).

and appellant duly made its objection to the giving of the foregoing instruction as follows:

"The plaintiff also wishes to take exception and objects to the submission to the jury and in the instructions to the jury on the ground that the agent who took this application, the question of whether he was negligent and careless in obtaining the application — the point that we wish to point out to your Honor and object to and take exception to, is that there is no duty in the first instance or any obligation which would permit the question of negligence or lack of negligence to be submitted to the jury. And secondly, that even if that were a proper issue in this case, that the evidence conclusively shows that due care was used.

"There is not a scintilla of evidence or any facts whatsoever to permit the jury in this particular case to define, to find that the plaintiff or its agents did not use due care and diligence.

"Therefore, it is a submission of the question of fact first of which there is no issue, and second, if there was an issue, that it is conclusively shown that the plaintiff did comply with all of the requirements of law." (R. 302)

STATEMENT OF THE EVIDENCE

From a review of the evidence received this case is unique in at least two respects: (1) All of the evidence which the jury was entitled to consider was presented by appellant's witnesses and exhibits and was introduced on appellant's case in chief; and (2) the facts relevant to the issues submitted to the jury were undisputed as appellees introduced no evidence which would tend to contradict, discredit or weaken this evidence. Appellant will have occasion in the course of this brief to stress the importance of these two unique facets.

On April 16, 1957, towards the close of the business day, defendant McKinzie walked into the office of Bucholz Insurance Agency in Portland, Oregon, and advised their office manager, Reuben Edward Snyder, that he wished to procure an automobile liability policy covering an automobile which he had purchased earlier in the day from a used-car dealer (R. 138). McKinzie had never had any previous dealings with the Bucholz Insurance Agency, with Snyder, or with appellant (R. 154). Snyder was alone in the office and proceeded in a routine manner to obtain the necessary information from McKinzie in order that an insurance policy might be issued by appellant. Appellant's procedure required that certain information be obtained and a form to be filled in in triplicate had been furnished for this purpose (Ex. 1) (R. 140). Snyder proceeded to ask questions of McKinzie concerning his name, address, type of car, etc., and from the answers given to him fill

in the necessary blanks upon the application form. Snyder testified that he read aloud all of the questions which appear upon the application and that McKinzie orally made the answers which in turn were written down on the application by Snyder (R. 140-141, 154). The pertinent questions and answers are as follows:

APPLICANTS STATEMENT

(Under No Circumstances will the Exchange be bound unless all questions below have been answered)

1. Have you or ANY DRIVER of this car—
   (a) any physical impairment? ....No....
   (b) had auto insurance cancelled or refused? ....No....
   (c) had license revoked or suspended? ....No....
   (d) received any driving charges, citations or fines (not parking) in past 3 years? ....No....
   (e) been involved in any auto accident as a driver in past 3 years? ....No....
2. Name of previous insurer ....None....
   Policy Number.....
3. Name and address of Employer ....Page & Page Truck Equipment Co..... ....Portland....
4. The vehicle (is) is not used in the duties of my present occupation.
5. The following are the only other drivers of this vehicle living in the household:

Name	*Age*	*Relationship*	*% Of Driving*	*Single or Married?*
None				

6. How long have you known Agent? ....New....
7. Did Agent inspect vehicle? ....Yes....
8. Any unrepaired damage noted? ....No....
9. I am (single) married.
10. My age is 40 and birthdate.....
11. How many cars in the household? ....One....
12. If vehicle not garaged at above address, state where
    .....
13. How long living at present address? ....2 years....

"Q. About 6:00 p.m. Did he ask you any of these questions on the applicant's statement or did he just fill them out?

A. He asked me.

Q. He asked you some questions. Did he ask you all of the questions that are on this applicant's statement?

A. I think he did, yes.

Q. He asked you every one of those questions?

A. That's right.

Q. Did he ask you if your license had been suspended?

A. Evidently he did.

Q. Do you remember that definitely or not, or can you remember?

A. I think he must have.

Q. You think he must have?

A. Uh-huh. He read all of the answers off there and I just said, no, no no." (R. 123)

At no place in the testimony of Snyder or in the deposition of McKinzie is there any dispute that the answers which appeared upon the application were other than those which McKinzie made himself. There is no indication that McKinzie did not understand the questions nor is there any indication that any additional explanation or elaboration was in any way given by McKinzie in connection with any of these answers.

After all of the answers to the questions appearing on page 1 of the application had been written down by Snyder, McKinzie signed the application "A. A. McKinzie," (R. 142), made a down payment of $20.00, on account of the premium, and received a receipt for this amount together with a duplicate copy of the application (R. 142). The application was then sent to the

underwriting department of appellant in Seattle, was duly processed, and, as the application was in all respects regular and indicated what would be considered a good risk, an insurance policy (Ex. 3) was duly issued and delivered to McKinzie.

Following the automobile accident of June 8, 1957, when appellees were injured the appellant in the course of its investigation learned for the first time that a number of the answers which were given by McKinzie in his application were false. The investigation disclosed that McKinzie had had his license revoked or suspended in the State of Oregon, that he had had a traffic violation in the State of Oregon, and that at the time he made the application for insurance he did not have an operator's permit in the State of Oregon. After McKinzie's deposition was taken, in which he admitted a traffic violation in California, an inquiry was made to the California Department of Vehicles and it was then learned for the first time that McKinzie had had at least three traffic violations in that state within three years prior to the application. In his deposition McKinzie also admitted that he had had previous insurance with other companies. The witness Ray G. Carlson, who testified in his capacity as the underwriting manager for appellant, stated categorically that if the information relative to McKinzie's previous driving record had been clearly set forth in the application that appellant would not have issued the policy (R. 160-163).

SUMMARY OF ARGUMENT

The first and second of the foregoing specification of errors, namely refusing to grant appellant's motion for a directed verdict, and denying appellant's motion for an order setting aside the verdict and for entry of judgment n.o.v., involved the same question of fact and principles of law. It is contended by appellant that each and every allegation of appellant's complaint was conclusively proved and that there was not an iota of evidence to support the alleged defense of negligence raised by appellees; hence appellant was entitled to a directed verdict. We will therefore discuss both of these specifications under "Argument I." Specification of Error 4 covers the failure of the court to withdraw the alleged defense of negligence (plaintiff's requested instruction No. 2, R. 43) and Specification of Error 5 covers appellant's objection to the court's instructing the jury that common law negligence of the agent who took the application for insurance would bar equitable relief requested by appellant. If appellant is correct in these contentions the court erred in failing to grant appellant's motion for a new trial, Specification of Error 3. We will therefore discuss these three specifications of error under "Argument II" and our discussion will be extremely brief, since the points involved will have been thoroughly considered under "Argument I." Obviously, if this court holds that appellant was entitled to a directed verdict it will be unnecessary to consider these specifications of errors.

By way of introduction and before proceeding to take

up in detail the particular issues raised by this appeal, appellant feels that it may be of assistance to this court if attention is directed to certain peculiar features of this case which became apparent as it progressed but which might be overlooked upon considering the cold transcript of record. Taking together the pleadings, the pretrial order, the opening statement of appellees, and the evidence which was offered by appellees, it is unmistakably clear that the defenses raised in this case were grounded upon theories of estoppel, waiver and laches. These particular defenses were in the course of the trial properly withdrawn from the case but only after appellees had introduced their only evidence through the testimony of the witnesses Dorris, Rose Marie Gilmont, Kosta and Colbert. None of the testimony of these witnesses in any way related to the issues as finally submitted to the jury. To the contrary, these witnesses were all testifying as to events which occurred subsequent to the accident of June 8, 1957, and from the instructions by the court to the jury anything which transpired subsequent to that date was entirely irrelevant and was in no way to influence them in determining their verdict (R. 288-289). Nowhere in the opening statement made by appellees' counsel is there any indication that they expected in any way to prove any negligence on the part of appellant in taking the application from McKinzie nor was any contention made that they would introduce evidence to show that the false representations made on the application were not material. Obviously, from the opening statement their case was to be based upon the defense of estoppel or waiver or laches or a

combination. Nowhere in the trial of the case did appellees attempt to introduce any evidence that appellant's conduct in taking the application on April 16, 1957, was in any way negligent.

ARGUMENT

I

At the close of the trial the court instructed the jury that they had two issues to determine (R. 287). The first issue concerned the question of the effect of the representations which were made by McKinzie in his application and the second concerned the question of whether appellant acting through Snyder was careless and negligent in obtaining and completing the application.

It is the position of appellant in regard to the first issue that the evidence conclusively established all the elements which would be necessary to permit it to legally rescind the insurance policy, so that there was no issue to be submitted to the jury.

Appellant had the burden of proof as set forth in *Amort v. Tupper,* 204 Or. 279, 282 P.(2) 660, to establish all of the following elements necessary for rescission:

(1) Defendant McKinzie made certain representations in his application.

(2) These representations were false and were made with knowledge of their falsity or were made recklessly and without any regard to their truth or falsity.

(3) One or more of these representations were made for the purpose of inducing appellant to act upon them.

(4) One or more of these representations were material.

(5) Appellant relied on the representations.

(6) Appellant suffered damage.

We will take up the foregoing elements in the order listed.

Defendant Made Certain Representations in His Application

As heretofore set forth in "Statement of the Evidence," McKinzie made certain representations relative to his driver's license, traffic violations, automobile accidents, and the status of prior insurance policies. There is no dispute that these representations were made.

The Representations Were False and Were Made With Knowledge of Their Falsity or Were Made Recklessly and Without Any Regard to Their Truth or Falsity

As to McKinzie's representation that he had never had his driver's license revoked or suspended, McKinzie admitted this representation was false.

"Q. Now, do you have an Oregon driver's license now?
A. No.
Q. Have you ever made application for one?
A. I did.
Q. When?

A. After that.
Q. When?
A. After that 'no muffler' charge.
Q. What was the effect of that?
A. Suspension for a year. (48)
Q. When did you make application, about when?
A. February, after this 'no muffler' charge.
Q. Of 1956?
A. 1956, correct.
Q. And they said they would—
A. The State suspended my license for a year and I thought it was a real bum rap.
Q. Do I understand you correctly now, after your muffler citation sometime in February of 1956 you made an application to the State of Oregon for a driver's license?
A. That is correct.
Q. And they then advised you your driving permit or license in the State of Oregon will be suspended?
A. For one year.
Q. For one year, from approximately February 1956 to February 1957?
A. That is correct.
O. Now, did you ever get a driver's license from the State of Oregon?
A. Not after that, no." (R. 112)

As to McKinzie's representation that he had not received any driving charges, citations or fines in the past three years, McKinzie admitted that this was false.

"Q. Now, were there any driving charge, citations or fines in the three years prior to the time you made this application?
A. Here in Oregon?
Q. Any place. (52)
A. Well, I might have had some tickets in Los Angeles, if that is what you mean.

Q. What would they be for?

A. For motorcycles. I used to drag race once in a while.

Q. What would be the citation? Would it be for overtime parking?

A. No drag racing.

Q. For speeding?

A. Drag racing. Just drag it from a signal, a motorcycle.

Q. Would that be within three years prior to the time you made application for this insurance?

A. It could be.

Q. Well, let's put it down to states.

A. A motorcycle is a little different than an automobile.

Q. I appreciate that. In the State of Oregon in the three years prior—

A. No tickets at all.

Q. What about this 'no muffler' charge?

A. Well, that is the only one.

Q. Other than the 'no muffler'?

A. There was no fine even connected with that. The fact, the judge was mad the State had suspended my license or, hadn't suspended my license, but the judge was real (53) mad, he figured it was up to him to do the suspension instead of the State. So he wouldn't even fine me.

Q. All right. But there was a traffic violation in Oregon.

A. That is the only one.

Q. Within three years, and that was the 'no muffler'?

A. Yes.

Q. And that was down in Corvallis?

A. That's right.

Q. Other than that, there was none within three years?

A. That's right.

Q. How about the State of California, within three years of April 16, 1957?

A. I told you the drag racing.
Q. Any others?
A. That is all." (R. 115-117)

As to McKinzie's representations that he had had no previous insurance carriers, McKinzie admitted this representation was false.

"Q. All right. Now, directing your attention to question 2, under the same applicant's statement—
A. Uh-huh. (57)
Q. 2, I didn't put that down. Is that correct?
A. No, because I don't recall the insurance companies that I have done business with.
Q. Well, do I understand you that—
A. I hadn't had any insurance for quite a while then.
Q. Do I understand you, then, that the answer to number 2 was given as, 'None,' because you didn't recall the names of the companies?
A. That's right, I don't carry all of this stuff around in my pockets.
Q. But you did have previous insurance?
A. Yes, I bought several different cars on time, naturally I was insured." (R. 119-120)

"Q. Would it be correct to say that your answer to number 2 under your 'Applicant's statement' is not correct, is that right?
A. That's right.
Q. It is not correct?
A. He wrote it in there himself, the agent did.
Q. Well, where did he get the information?
A. Probably from me, I don't have any insurance policies in my pocket.
Q. Did he get all of this information from you?
A. Evidently, I was the only one there." (R. 122)

At no time did McKinzie contend that he did not understand the questions or that he had a lapse of memory. To the contrary, his only explanation seems to be

that he thought the suspension of his Oregon driver's license was a "bum rap" and that since he had had so many other insurance carriers he could not remember any of the names he answered this question by saying that he had had none.

In addition to the representations that McKinzie admitted were false, documentary evidence (Exs. 19A, 19B, 19C, 19D) showed that he had had three traffic violations in California within three years prior to the date of the application. There is therefore no dispute that certain of the representations made by McKinzie were false.

One or More of These Representations Were Made For the Purpose of Inducing Appellant to Act Upon Them

McKinzie came into the office of the Bucholz Agency solely for the purpose of securing insurance on the automobile which he had purchased earlier in the day. He initiated the negotiations leading up to the issuance of the policy and it was incumbent upon him to make full disclosure of all the information which appellant felt was necessary in its determination of whether or not to issue the policy. McKinzie signed the application and received a copy thereof. Immediately above his signature was printed the following language:

> "I declare the facts within the applicants statement to be true and request the Exchange to issue the insurance in reliance thereon."

No one could come to any other conclusion than that which is apparent from the uncontradicted evidence,

namely, that McKinzie had no other purpose in giving the information requested than to secure a policy of insurance from appellant so that the representations that he made were intended solely for this purpose and there was no issue thereon to be submitted to the jury.

One or More of the Representations Were Material

The only direct testimony upon this issue came from the witness Ray T. Carlson, who unequivocably established that if McKinzie had made an honest disclosure of the facts concerning his driving record the appellant would under no circumstances have issued the policy. This testimony was corroborated by Plaintiff's Exhibits 22 and 23 which were the manuals prepared for the use of the various agents.

Appellant concedes that in an action for rescission based upon fraudulent representations the question of whether one or more of the false representations were material is one of fact. Appellant's position on this question is that the evidence adduced in this case conclusively shows that one or more of the representations made by defendant McKinzie were material and that the trial court should have so ruled as a matter of law. While appellant is unable, after an exhaustive search, to point to any one case holding that such representations were material as a matter of law in connection with rescission of an automobile liability policy, there are numerous cases dealing with life, accident and health insurance where comparable false representations have been held material as a matter of law. There are numerous pol-

icies in which the trial court held that the false representations were material as a matter of fact and impliedly indicated that they considered the false representations material as a matter of law. There are likewise cases dealing with the same subject by appellate courts who were not called upon to decide whether the false representations were or were not material as a matter of fact but who impliedly did consider the false representations material as a matter of law. We will first consider the recent cases dealing with rescission of automobile liability policies.

State Farm Mutual Auto. Ins. Co. v. West, 149 F. Supp. 289, was a case which was remarkably similar on its facts to the instant case. There, in an action under the Declaratory Judgment Act, it appeared that plaintiff, in reliance upon West's representation that his operator's license had never been suspended or revoked, issued a liability policy.

As in the instant case, the insurance company in the course of investigating an automobile accident which occurred between defendant West and the other defendants, discovered for the first time that West's license had been revoked and the court having tried the case without a jury, after making appropriate findings, stated at p. 305:

> "The court has no difficulty in holding that the answers in the applications were representations made by West to the plaintiff. A material misrepresentation made by an applicant for insurance, in reliance on which a policy is issued to him, renders the policy voidable as against the applicant and all

> who stand in no better position, whether such misrepresentation be made intentionally, or through mistake and in good faith. (Citations omitted) Where evidence of bad faith or falsity or materiality is uncontradicted or clear and convincing, the court may so rule as a matter of law. The court, already having found as a fact that the negative answers to questions 16 and 18 in the applications were material, false, and relied upon by the insurer in issuing the policies, so rules as a matter of law."

It is interesting to note that in *State Farm Mutual Auto. Ins. Co. v. West,* supra, the assured, West, and the persons injured and charging West with negligence were all made parties defendant, that all defendants contested the right of the plaintiff to rescind the insurance policy, and that all defendants pleaded estoppel as a defense. In commenting on the defense of estoppel as to assured West, the court stated: "That one cannot profit from his own wrongdoing is clear" (citing cases) and then went on to quote from *New York Life Ins. Co. v. Odom,* 93 F.(2) 641, certiorari denied 304 U. S. 566, as follows:

> "Since the insured furnished false evidence which was relied upon by the insurance company, he was guilty of fraud in law which would avoid the policy, whether he was in good or bad faith and whether he intended to deceive or not. (Citations omitted) It is elementary that one who is guilty of fraud cannot urge estoppel against the other party to the contract for the purpose of making his fraud effective."

In commenting on the same defense of estoppel raised by the injured defendant the court stated at p. 307:

> "Ordinarily an injured person has no better or

> different rights under the policy than the insured (Citations omitted). Assuming, *arguendo,* that there may be cases in which by estoppel an injured person may have rights superior to those of the insured as against the insurer, this is not such a case. There is absolutely no evidence whatsoever that the injured defendants have been misled to their prejudice or into an altered position, an indispensable element of estoppel."

It is further interesting to note that in all cases we have read covering rescission of automobile insurance policies on the grounds of fraud where the assured and the injured parties were defendants, that the assured actively defended the attempted rescission. In our case the assured, McKinzie, not only did not appear but in his deposition admitted all the claims of appellant as to the fraud perpetrated upon it. It is clear that an injured person has no better rights under the policy than the assured, in the absence of special circumstances such as collusion between the assured and the insurance company, and we suggest to the court that the defendant McKinzie having defaulted, the allegations of the complaint are established as true as to defendant McKinzie and therefore the appellees Gilmont having no greater rights than the assured, stand in the same position as the defaulted assured McKinzie. This was suggested to the court by appellant (R. 304) and in reply the court said:

> "The Court: I understand your position in this matter about it. I'll restate my position about it. As far as I know the interests of the defendants Gilmonts and the defendant McKinzie are adverse. For all I know, maybe he is staying away pur-

posely. Their respective rights being adverse, they are not standing in privity to each other. This is a controversy being purchased here between plaintiff and the defendants Gilmonts. That's my position."

The fallacy in the court's position is that there is not a scintilla of evidence or the slightest suggestion that there was any collusion between appellant and defendant McKinzie and appellees did not contend that there was. We have been unable to find any case dealing with the rights of injured persons, who are not necessary parties to the litigation, to resist the claim of rescission where the assured has defaulted and thus admitted the right to rescind, but logically it would appear to us that the injured persons, in the absence of collusion, have no standing to resist rescission where the assured by his default has admitted that the insurance company has the right to rescind.

In *Tri-State Ins. Co. v. Ford*, 120 F. Supp. 118, two policies of insurance were involved, one a physical damage policy and the other a public liability policy. It would appear these two combined policies were comparable to the insurance policy in this case. The assured, Ford, was involved in an automobile accident in which the co-defendants were injured and thereafter action was brought by the insurance company pursuant to the Federal Declaratory Judgment Act.

The District Court in its opinion stated that the evidence established that the assured had made false representations in obtaining the policy, namely, that no policy had been cancelled during the previous year,

whereas five policies had been cancelled during the period; that the insurance company relied on the false and fraudulent representations; that said misrepresentations were material to the risk in said policies of insurance; and that the insurance company would not have issued the policies if it had known of the cancellations. The insurance policies contained a provision which is identical with condition 22 of our policy (Ex. 3). Decreeing rescission of the policy on account of fraud, the court stated: P 121-122

> "As recognized in the enumerated findings of facts, the insured secured this policy by fraudulently representing a fact material to the involved risk; and, although the soliciting agent for the plaintiff was negligent in not establishing that said representation was false, the policy was in fact issued in reliance upon the insured's false warranty. Under such circumstances the insured has no standing in a court of equity to resist a petition for cancellation."
>
> * * * * *
>
> "In addition, the insured in the case at bar cannot by means of parol evidence attempt to impeach the unambiguous terms of the written insurance contract."

In *Adriaenssens v. Allstate Ins. Co.*, 258 F. (2) 888, the injured parties sued the insurance company direct on the insurance policy after obtaining judgments against the assured, who died after the judgments against him were obtained. The defendant insurance company pleaded as a defense fraud in the procurement of the policy in that the assured falsely represented that his driver's license had never been revoked.

Rescission was granted by the court without a jury and on appeal the Court of Appeals, Tenth Circuit, stated at p. 889:

> "The court found among other things that the representation was made in the application for the policy; that it was untrue; that the driver's license of the insured had been twice revoked because of drunken driving; that the representation was material; that it was relied upon by the insurer; and that the policy would not have been issued if the revocations of the license had been disclosed. Judgment was entered in each case denying recovery upon the policy; separate appeals were perfected; and the causes were submitted in this court upon a single record."

After disposing of various contentions of plaintiff as being without merit, the Court of Appeals took up the complaint that the court erroneously placed upon appellant the burden of proof respecting the issue of fraud in the application for the policy of insurance. On this point the court said at p. 891:

> "It is argued that the court in effect required appellants to prove that there was no fraud on the part of the insured. Of course, the burden rested upon the appellee to establish by evidence its affirmative defense of fraud on the part of the insured. Recognizing such burden, the appellee introduced in evidence the application signed by the insured and containing the representation that his driver's license had never been revoked. Appellant (sic) introduced in evidence official records showing that on two separate occasions the driver's license of the insured had been revoked upon the ground of drunken driving. And it was stipulated that if a representative of appellee from its office in Kansas City, Missouri, were present he would

> testify that he was familiar with the policies of the company in respect to issuing insurance to persons whose driver's license had been revoked; that in determining whether to issue a policy, appellant relied upon the representations contained in the application; and that the policy in question would not have been issued if the appellant had known of the revocations of the license issued to the insured. That evidence—considered in its entirety—was sufficient to establish a prima facie case of fraud on the part of the insured in obtaining the issuance of the policy. The court did not place upon appellants the burden of proof respecting the issue of fraud. Instead, the court merely determined that appellee introduced evidence establishing a prima facie case of fraud which was not met or overcome by persuasive countervailing evidence."

Presumably there was no testimony contradicting the evidence of fraud and if this is so, the case is squarely on all fours with our case. If there was contradictory evidence or a dispute thereon our case is even stronger, since there was no contradictory evidence whatsoever.

Klim v. Johnson, 16 Ill. App. (2) 849, 148 N.E. (2) 828, was a proceeding whereby a person injured, after obtaining a judgment against the assured, Johnson, brought in the Allstate Insurance Co. to recover the amount of the judgment obtained against Johnson. The insurance company defended on the basis that the contract of insurance had been rescinded because of fraud perpetrated upon it by Johnson. The alleged fraud was the failure of Johnson to divulge when his application for the policy was taken that a prior automobile policy had been cancelled. As in our case, the answers to the questions required by the written application were writ-

ten in by the soliciting agent and the policy when issued contained provisions comparable to conditions 19 and 22 of our policy. There was a dispute as to whether the agent had correctly written down the answer relative to cancellation, the assured, Johnson, contending that he had advised the agent of the prior cancellation. The trial court held that Johnson had falsely answered the question relative to cancellation and allowed the rescission of the policy by Allstate to stand. On appeal the plaintiff contented that the trial court had erred as a matter of fact and in law in holding that Johnson made misrepresentations which entitled the insurance company to rescind the contract, together with other alleged errors which are not pertinent to this inquiry. It should be specifically noted that the controversy as to the facts was whether or not Johnson had made a false representation and there appears no question that if he did make the misrepresentation, which the trial court found he did, that such false representation would be material, for the Appellate Court stated:

> "Representations made by an applicant for automobile insurance, as to prior cancellation and frequency of accidents, are matters which materially affect the risk insured against. Allstate was entitled to that information to determine if it was willing to assume the defendant as a risk. The evidence establishes that Johnson made material misrepresentations, both as to prior cancellations and as to accident experience. The trial court had sufficient evidence before it to find that Johnson made material misrepresentations at the time of application for insurance.
>
> * * * * *

"Primarily, this case is a question of good faith of the insured in answering the application question regarding prior cancellations, which was followed by the policy accepted by him, containing a *declaration* negating prior cancellations. The trial court could have found it difficult to believe that Johnson misunderstood the meaning of 'cancel' or 'cancellation,' as used in the notice sent him by Industrial or by the letter of the Standard State Bank, notifying him to replace the 'cancelled' policy.

"When the policy issued, it embodied the contract and gave notice that its terms could not be waived or changed by an agent. The law cannot be that at the very moment the policy was delivered, the declaration as to 'no prior policy cancellations within two years' was waived and meaningless, and that the declaration negating the same did not mean what it said. If that were the law, it would be possible by parol evidence to destroy many documents, lucid in form and with no question of construction involved. The policy in suit, with the 'Declarations' attached, is a document complete in itself, and the plaintiffs cannot successfully contend that Johnson took it, presumably read it, and yet, as a matter of law, is not bound by the 'Declarations' and 'Conditions' set forth therein. This court has consistently supported this doctrine."

We believe that there is no Oregon case dealing with rescission of an automobile liability policy on the grounds of fraud so we turn now to cases dealing with rescission of life insurance policies on the grounds of fraud which, we submit, where the fraud is based on the application for the policy, are identical in principle wth the automobile liability policy cases.

One of the leading Oregon cases is *Mutual Life Ins.*

Co. of N. Y. v. Chandler, 120 Or. 694, 252 P. 559. In this case the insurance company brought action to rescind the policy on the grounds of fraud and the beneficiary under the policy filed a cross bill for the recovery of the amount of the policy. Decree was for the defendant and the plaintiff appealed. One of the questions asked on the application form was to state the diseases since childhood and the assured answered this by listing some minor ailments. Another question was to state each physician who had treated the assured or whom the assured had consulted in the past five years. To this last question the assured answered "None" except naming one doctor.

The policy in question provided in part as follows:

> "This Policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the Insured shall avoid or be used in defense to a claim under this Policy unless a copy of the application is indorsed on or attached to this Policy when issued."

There was a dispute as to whether the assured had tuberculosis or even if he had as to whether he knew that he had, but there was no dispute that the assured had consulted other doctors than the one listed during the five-year period.

The court on appeal first discussed the difference between a warranty and a representation and held that the answers to the questions were in the nature of rep-

resentations and that the issue therefore "depends upon whether an untrue answer to the question about his having consulted other physicians is material." The Supreme Court then went on to show the distinction between the answer to the question of whether the assured had been afflicted with a disease and the answer to the question requiring the assured to list the names of all doctors who had treated him during the past five years. The court pointed out that as to the first question in many instances the assured would not know whether he was or was not afflicted with a disease and that therefore in order to constitute fraud there must be "an element of wilfulness or knowledge that the statement on that point is untrue in order to bind the assured", and therefore in deciding the case disregarded the answer to the first question. However, as to the second question the court said: at p. 698:

> "The representation, however, that he has not consulted or been treated by any other physician is one peculiarly within his knowledge and the law requires in such a case the utmost good faith and full disclosure in answer to direct inquiries on the part of one making an application for the policy."

In reversing the trial court and decreeing rescission the court quoted with approval from *Lewis v. New York Life Ins. Co.*, 201 Mo. App. 48, 209 S.W. 625, as follows:

> "Insured's statement in application for life policy that he had consulted but one physician when in fact he had consulted a number related to a matter forming the very basis or foundation of the contract, and worked a legal fraud on the company whether applicant intended to deceive or not."

* * * * *

"It is not a question of whether these consultations were for Bright's disease or whether he was suffering therefrom or his death hastened thereby; nor is it a question of whether he thought these consultations were material or not. He was answering questions which the company wanted to know the truth about before it would enter into the contract. It had the right to know the truth in order that it could decide for itself whether it would insure him or not. If it had known he had consulted various other doctors recently and for other matters, it could have investigated on its own account and decided for itself whether it would take him as a risk. Nor would it have been necessary then to establish beyond doubt that he was in fact suffering with a serious and insidious disease; for at that time the company had not entered into the contract, could not be compelled to do so, and could be as 'squeamish' about accepting him as a risk as it desired to be. If it was fearful that he might have incipient Bright's disease, it could have refused the insurance though all the world said he did not have it. To allow him to refrain from giving full, true, and complete answers to the specific questions then asked, on the ground that he did not think the answers *material,* would be to let him decide for the company whether it should undertake the risk." (Emphasis added)

Then speaking for itself the Supreme Court of Oregon stated:

"In the instant case, the assured did not die of tuberculosis or any of the diseases involved in the inquiry, but that is not the question. The parties were negotiating for the purpose of making a contract of insurance. Each was entitled to the exercise of the utmost good faith on the part of the other. The assured had made an offer to the company couched in certain terms. He said, in sub-

stance, 'I am a man who has consulted only one physician whom I name and that merely for mild attacks of influenza and tonsilitis which did not prevent me from working at my usual occupation.' Possibly without wicked intention he neglected to state the names of the other physicians with whom he had consulted and who had treated him for tuberculosis. While he might have been ignorant of the existence of the disease, he was not ignorant of the fact he had consulted and taken treatment from at least one other physician. Having directly asked for it, the company had the right to know the exact truth on that subject. It was entitled to a fair offer without concealment, so that it could use its own election about accepting that offer. . . . The concealment of the fact peculiarly within his knowledge that he had consulted other physicians was to stiflle legitimate inquiry on the part of the insurer while the negotiation was yet in the formative stage.

* * * * *

"To hold otherwise would take from any party considering an offer the right to accept or reject the same, and this too at the behest of the other party, although the latter had stifled investigation by the concealment of matters which would naturally challenge the consideration of the other."

We submit that the terms of the two types of policy are comparable and, if anything, the terms of the automobile liability policy are more stringent, and that the false answers McKinzie gave that his driver's license had never been revoked or suspended or that he had never had any accidents in the past three years are comparable to and just as material as that the assured had consulted only one doctor.

The cases are myriad along the same line as *Mutual*

Life v. Chandler, supra, but we will only cite one other case arising in a jurisdiction outside Oregon, and that is *National Life and Accident v. Gorey*, 249 F.(2) 388, decided by this court on November 6, 1957. This case arose in California and it is our belief that the law of California relative to the rescission of a life insurance policy on the grounds of fraud is the same as that of Oregon. In reversing judgment in favor of the beneficiary under the policy and directing entry of judgment in favor of the insurance company except as to the sum of the premium tendered, this court stated:

> "It is important to remember that defendant was entitled, not only to know that decedent was in good health when insured, but also was entitled to have before it, before issuing the policy, a truthful statement by the proposed insured of his medical history. If we assume, (as we do here because no evidence exists to the contrary) that there was no intent on the part of the decedent to deceive or defraud the insurance company, and that his answers were innocently, though carelessly, given, his lack of intent to defraud is not controlling. The misstatement, according to the only evidence on the subject, was relied upon by the defendant, and did materially affect the defendant's willingness to accept the risk. The defendant asked for specific answers to two certain questions: the answers given were not true, and defendant was denied the right to determine for itself the matter of the deceased's insurability, and the underwriting risks it was willing to undertake. Robinson v. Occidental Life Ins. Co., 131 Cal.App.2d 581, 586, 281 P.2d 39, 42. This is a right that any insurer has, and must have.
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> * * * * *
>
> "As a matter of law, the evidence in this case shows that the deceased by incorrect and untrue

> answers misrepresented and concealed material facts; that defendant relied on such misrepresented facts, and issued its policy in reliance thereon. Because of this, the defendant's motion for a directed verdict or for a judgment n.o.v., should have been granted by the trial court." (Citations omitted)

In the instant case the defendant McKinzie came to the appellant seeking to enter into a contract of insurance which would provide liability coverage on the operation of his automobile. As in the case of any other applicant the appellant required certain information from which it would determine whether or not it would enter into such a contract of insurance. The questions which are set out in that portion of the application entitled "Applicant's Statement" were certainly not capricious. They certainly did not ask for any information which would be difficult to furnish. They certainly were not irrelevant to appellant's decision and they certainly were not ambiguous or unintelligible. The questions simply looked for information concerning the applicant's previous driving record, his ability properly to operate an automobile, what history he had had with previous insurers, if any. This information is certainly as material to the particular risk as would be information on a life insurance policy relating to an applicant's medical history. Certainly the potential exposure of the company under this policy ($10,000-$20,000) is as large as a great number of life insurance policies which are written. For a total premium of approximately $60.00 of which McKinzie actually paid only $20.00, appellant was affording very substantial coverage to the applicant

for a period of six months and this was solely and directly connected with the manner in which he would operate his automobile during that time. Nothing could be more obvious that in considering whether or not to assume this liability the company needed information as to the applicant's history and ability properly to operate an automobile. Certainly the appellant was not interested in whether or not the applicant "smoked black cigars" but it was vitally interested in the experience which he had in driving an automobile.

We submit, first, that the admitted false representations made to appellant by defendant McKinzie were material as a matter of law, or, secondly, even if it be considered that whether these false representations were or were not material was a question of fact, that the evidence conclusively established that these misrepresentations were material. On either theory there was no question of materiality to be submitted to the jury.

Appellant Relied on These Representations

There is not an iota of evidence that the appellant had any intimation that the answers which were given by McKinzie were other than true until it commenced its investigation of the accident which occurred on June 7, 1957. The witness Carlson testified that the usual procedure at appellant's home office was to examine each application which came in from its various representatives and on the basis of the information submitted the decision was made by the underwriters as to whether or not the policy would be issued. Carlson

testified that on the face of this particular application there was not a single feature which would in any way cause an underwriter to reject the application or to make any further investigation as to the facts disclosed. There was nothing in the testimony of McKinzie or of the witness Snyder which would give rise to any suspicion that McKinzie was telling other than the truth as to the questions asked.

Appellant Suffered Damage Because of One or More of These False Representations

There would seem to be little need to elaborate on this point. Obviously, if defendant McKinzie had told the truth at the outset the appellant would never have issued its policy and if this judgment is allowed to stand it will be tantamount to bestowing upon the wrongdoer the benefit of a contract which he instigated through his own fraud. In the field of insurance law the cases have, over the years, developed certain rules which impose very definite burdens and responsibilities on the insurers. However, insurance companies, no less than any other person, are entitled to the benefit of truthful answers which they ask preliminary to entering into a contract. They should not be under the burden of having to assume that each applicant is untrustworthy and that all information given to it must be verified before issuing a policy.

We reiterate that the evidence conclusively established all the facts necessary to a rescission so that there was no issue thereon to be submitted to the jury.

The second theory on which the court submitted this case to the jury, i.e. common law negligence on the part of appellant (R. 294-295), is just as untenable as the first issue submitted.

In appellees' amended and supplemental answer to the complaint of appellant these parties alleged certain facts which they contended constituted (1) a waiver on the part of appellant to have the insurance policy (Ex. 3) set aside on the grounds of fraud; (2) estopped appellant from rescinding the insurance policy; and (3) claimed the relief demanded by appellant was barred by laches. At the pretrial appellees injected into the controversy for the first time the contention that appellant was careless and negligent in obtaining and completing the application for insurance from defendant McKinzie (R. 27). This contention having been injected by the appellees was carried over in identical language to the issues (Pretrial Order R. 30) in addition to the aforementioned affirmative defenses of waiver, estoppel and laches.

The trial court declined to give appellant's requested instruction No. 2 reading as follows:

> "Defendants Gilmont have contended and set up by way of defense to this action that plaintiff was negligent in obtaining and completing the application for insurance from defendant Arthur Allen McKinzie. You are instructed that there is no evidence from which you could find that plaintiff was negligent in obtaining and completing the application for insurance from defendant McKinzie and you will therefore completely disregard this contention and defense in determining this case." (R. 43)

and instructed the jury as follows:

> "Now members of the jury, there is a second issue which is raised by the contention of the defendants Gilmont as to whether or not the agent at the time he took the answers from McKinzie acted with ordinary, reasonable care for the protection of his own company, and in that connection you are charged that the defendants Gilmont have charged that the plaintiff, acting through the agent who took the application, was careless and negligent in obtaining and completing the application of insurance from McKinzie.
>
> You are instructed, members of the jury, that negligence as ordinarily defined, is a failure to do that which an ordinary, reasonable prudent person would do under the same (260) or similar circumstances, or doing that which an ordinarily reasonable prudent person would not do under the same or similar circumstances.
>
> Therefore, if you should find from the evidence that the plaintiff, acting through its agent, was careless and did not act as a reasonably prudent person, being an insurance company, in obtaining the answers from McKinzie while filling out the application for insurance by Mr. McKinzie, and thereby blindly or recklessly put down defendant's answers to the questions without reasonable credulence, you should then find that the plaintiff is not entitled to be relieved of obligation under its policy because then through such action and conduct he would have been, become a party to the transaction." (R. 294-295)

The gist of the court's instruction was that if the soliciting agent, the Bucholz Agency, acting through Snyder, was careless and failed to act as a reasonably prudent person in obtaining the answers from defendant McKinzie while filling out the application for in-

surance, then appellant was not entitled to have the insurance contract declared null and void. It is clear that the court was thinking and instructing the jury along the lines of tortious conduct akin to contributory negligence on the part of appellant since the court instructed the jury "that the defendants Gilmont have charged that the plaintiff, acting through the agent who took the application, was careless and negligent in obtaining and completing the application of insurance from McKinzie "and then went on to give the common law definition of negligence as the "failure to do that which an ordinary, reasonable prudent person would do under the same or similar circumstances, or doing that which an ordinarily reasonable prudent person would not do under the same or similar circumstances." (R. 294)

The signing of the application by defendant McKinzie was testified to by both Snyder and McKinzie and has heretofore been discussed in detail in this brief. The substance of their testimony is as follows: That all of the handwriting on the first page of the application (Ex. 1) with the exception of the signature by McKinzie, was Snyder's; that Snyder read to McKinzie all the questions required in the application, and that he correctly put down the answers given by McKinzie, after which McKinzie signed the application, and received a duplicate original thereof. The last paragraph of the application (Ex. 1) signed by McKinzie is as follows:

"I declare the facts within the applicants state-

> ment to be true and request the Exchange to issue the insurance in reliance thereon. I understand the insurance will in no event become effective prior to the time and date actually applied for, as indicated below."

Thereafter the application was transmitted to appellant who issued the insurance policy (Ex. 3) relying on the information contained in the application. All questions on the application were fully answered, the answers appeared reasonable, and there was not the slightest suggestion of any irregularity which would have aroused the suspicion of appellant when it received the application or for that matter of Snyder when he filled in the application.

It is also equally true, as heretofore pointed out in this brief, that more than one of the answers were false and that the issuance of the policy (Ex. 3) by appellant was induced by the mistake of appellant in believing that the questions had been truthfully answered. Now when appellant seeks to rescind the insurance policy appellees take the position that the equitable relief prayed for by appellant should be denied because of negligence on the part of appellant when it took the application.

There are a number of reasons why the claim that appellant's negligence was a bar to equitable rescission of the insurance policy should not have been submitted to the jury, such as:

(1) Negligence presupposes a duty owed to the party claiming negligence and a breach thereof. Here

appellant owed no duty to appellees or even to defendant McKinzie, for that matter.

(2) Even if appellant was "negligent" in some respects, which appellant does not concede, such negligence was not of the character sufficient to bar equitable relief, i.e., was not "culpable negligence."

(3) If there was any negligence in taking the application, which appellant does not concede, the negligence was that of the Bucholz Agency. The negligence of the Bucholz Agency cannot be imputed to appellant.

(4) Actually there is not a scintilla of evidence that appellant was negligent under any standard, even the lowest.

We will discuss these contentions in the order listed.

The standard of care to be used by the jury under the instructions of the court in this case was the common law standard and it is axiomatic that before there can be actionable negligence at common law or such negligence as would bar recovery on the ground of contributory negligence, there must be first a duty from one party to another and a breach thereof. Now what duty in taking this application did appellant owe to appellees or the public, or for that matter to defendant McKinzie, which it violated? We submit none.

> "Negligence exists only with relation to a duty to exercise care. Actionable negligence is based upon the breach of a duty on the part of one person to exercise care to protect another against injury, by failing to perform, or in the manner of performing, such duty, as a result of which the latter sustains an injury." (38 *Am.Jur.* Negligence, Sec. 12, p. 653.

Even if appellant was negligent in not discovering its mistake in issuing the policy under the abstract definition of common law negligence, such negligence will not bar the relief of a party from his mistake unless it amounts to a violation of a positive duty owed to the party claiming the negligence.

In *Parker v. Title and Trust Company,* et al., 233 F.(2) 505, which was decided by this court on May 4, 1956, the Title and Trust was induced through the fraud of Parker to issue a title insurance policy insuring the title of Parker and agreeing to indemnify Parker in the amount of the policy in the event his title was defective. Actually, the title to the property insured was in the United States. On action being brought by Title and Trust to set aside the policy on the grounds of fraudulent concealment by Parker of certain material facts, Parker (after denying fraud) asserted that Title and Trust was precluded from equitable relief because of its negligence in not discovering that title to the property was in the United States. The trial court found that Title and Trust was negligent in failing to discover that the title was defective, but notwithstanding this finding, held that such negligence was not a good defense and allowed cancellation of the policy, stating at p. 509:

> "The Oregon court's views of the type of positive legal duty whose neglect might give rise to culpable negligence was expressed by the court in Welch v. Johnson, 93 Or. 591, 608, 183 P. 776, 184 P. 280, at page 281, as follows: '(T)he negligence which will prevent the relief of a party from his mistake must be such as will amount to a violation

of a positive duty *owed to another party.*' (Emphasis ours.) It is plain that the view of the Oregon court is similar to that stated in Dixon v. Morgan, 154 Tenn. 389, 285 S. W. 558, 562, as follows: 'All negligence, to be culpable, necessarily implies the failure to perform some duty. * * * It is not a failure of duty to one's self, but to another, that constitutes culpable negligence.' "

It should be noted from the above question that this court uses the term "culpable negligence" and in this connection no clearer exposition of what constitutes culpable negligence can be made than by again quoting from *Parker v. Title and Trust Company,* supra, which reviews the Oregon authorities, at p. 509:

> "It appears to be well established by the Oregon decisions that the negligence which will bar equitable relief on account of mistake must be something more than mere ordinary negligence or negligence of the sort chargeable to the title company under the record in this case.
>
> This question is thoroughly discussed in the case of Wolfgang v. Henry Thiele Catering Co., 128 Or. 433, 275 P. 33, 36. In that case the court quoted from its earlier decision in Howard v. Tettelbaum, 61 Or. 144, 120 P. 373, the statement of the rule that 'negligence, in order to bar equitable relief, in case of mutual mistake, clearly established, must be so gross and inexcusable as to amount to a positive violation of a legal duty on the part of the complaining party.' The court also quoted with approval statements of the same rule as expressed in treatises on the subject of 'Equity' in legal encyclopedias. From 21 C.J., p. 88, Sec. 64(c), it quoted: 'Even gross negligence has been held insufficient to prevent relief for a unilateral mistake made with the knowledge of the other party.' It approved the statement from 10 R.C.L. Equity, p.

> 296, Sec. 40, that: 'The conclusion from the best authorities seems to be, that to constitute culpable negligence the neglect complained of must amount to the violation of a positive legal duty.' "

and at p. 510:

> "This view, that relief based on mistake is not barred by mere negligence, but that before such relief may be denied there must be *culpable* negligence, arising out of the violation of a positive duty owed to another party, found practical application in Rushlite Auto. Sprinkler Co. v. City of Portland, supra. In that case the mistake consisted of Rushlite's failure to include in its bid any amount for steel required in a city sewer on which it was bidding. It had obtained the quotations on steel prices from a dealer the day before the bid was filed. It forgot to include them; yet the court granted Rushlite relief by way of cancellation, approving the trial court's finding that the mistake was 'not culpable'.
>
> There is no finding of gross or culpable negligence here, and it is manifest that there could not be such under the facts of this case, for in overlooking the title defect the company was not violating any duty it owed to the Parkers."

In the Parker case, supra, Title and Trust, at the request of Parker, issued its policy of title insurance in a certain amount and agreed to indemnify him up to that amount if the title to the property insured was defective; the title was defective, and the trial court found that Title and Trust by the use of reasonable care and diligence should have discovered the defect and should not have issued the policy. This court held that this did not constitute *culpable negligence* and was therefore not a bar to equitable relief. In our case ap-

pellant issued a policy which in effect indemnified defendant McKinzie against loss up to a certain amount arising out of the negligent operation of an automobile. The two situations are identical: Title and Trust made a mistake in failing to discover a defect in the title which by the use of reasonable care it should have discovered; appellant made a mistake in failing to discover that the answers defendant McKinzie gave were false, and, for the purpose of argument, we will assume that by the use of reasonable and ordinary care it should have discovered that the answers given it by McKinzie were false. In any event, appellant owed no more duty to appellees, or to McKinzie, for that matter, than Title and Trust owed to Parker. If the negligence of Title and Trust did not involve the violation of a positive duty and could therefore not be characterized as culpable negligence, the negligence of appellant, if any, was certainly not of such a character — culpable negligence — as to preclude it from equitable relief.

It should be further noted that several of the Oregon cases cited in *Parker v. Title and Trust,* supra, were cases of mistake not involving fraud, while here we have fraud on the part of McKinzie. In equity and good conscience a more liberal rule should be applied to appellant in this case than should be applied in cases not involving fraud, for, as stated in *Mergenthaler v. Evans,* 69 F.(2) 287, 289 (Ninth Circuit):

> "Nor is one permitted to make false representations which induce another to enter into a contract and then assert that the party defrauded should have been more prudent and ought not to

have believed the representation. Outcault Advertising Co. v. Jones, 119 Or. 214, 234 P. 269, 239 P. 1113. And this rule extends even to where the other party had the opportunity to ascertain the truth for himself. Davis v. Mitchell, 72 Or. 165, 185, 142 P. 788."

Assuming that the transaction between the Bucholz Agency, acting through its employee Snyder, and McKinzie was of such a nature that an ordinarily prudent person in the position of Snyder would have suspected that McKinzie was giving false answers, or even assuming that there were some facts arising out of the taking of the application that would cause a reasonably prudent person in the position of Snyder to make further inquiry or even to investigate the character of McKinzie, this misconduct of Snyder cannot be imputed to appellant so as to bar it from rescinding the insurance policy when it learned the true state of facts, namely, that McKinzie had given false answers to the questions contained in the application. The record is clear that the authority of the Bucholz Agency was limited to soliciting applications for insurance so that any knowledge that it had or should have had as to any irregularity in taking the application or knowledge of any fact or facts that would put the Bucholz Agency on notice that false answers had been given in the application cannot be imputed to appellant. Moreover, the burden was upon appellees to establish that the agent had authority to bind appellant and they produced absolutely no evidence in this respect.

"The burden is upon the plaintiffs to establish

that the agent had real or apparent authority to bind his principal. (Citations omitted) Before an insured may rely upon apparent authority of an agent, it must appear that the principal knowingly permitted the agent to act as having the authority, and further that a person dealing with the agent acting in good faith would have reason to believe, and did in fact believe, that the agent possessed the necessary authority.

* * * * *

The knowledge of a soliciting agent is not imputed to the principal. Sadler v. Fireman's Fund Ins. Co., 1932, 185 Ark. 480, 47 S. W. 2d 1086. Where an agent has authority to solicit insurance, receive and write applications for insurance, and forward them to a general agent or home office for approval, to deliver the approved policy and collect the premium, he is a soliciting agent only, and proof of such facts does not show any authority on his part to waive the provisions of the policy. (Citations omitted) Pinkley, the defendant's agent, was a soliciting agent not empowered to waive policy provisions, and notice to him of policy violations cannot be mputed to the defendant." *Jackson* v. *M.F.A. Mutual Ins. Co.,* 165 F. Supp. 388, p. 391-392.

Further, conditions 19 and 22 of the insurance policy (Ex. 3) provide as follows:

"19. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Exchange from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed for MAYFLOWER INSURANCE EXCHANGE, by an executive officer of its attorney-in-fact, the MAYFLOWER UNDERWRITERS, INC."

> "22. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Exchange or any of its agents relating to this insurance."

These conditions are substantially the same as conditions 20 and 24 set forth in *Tri-State Ins. Co. v. Ford,* 120 F. Supp. 118, and in this last mentioned case the court, referring to the conditions in question, stated at p. 123:

> "In addition, the insured in the case at bar cannot by means of parol evidence attempt to impeach the unambiguous terms of the written insurance contract."
>
> * * * * *
>
> "The insured cannot at this juncture urge that the plaintiff's soliciting agent waived a material part of the involved risk and thus make of no legal consequence the insured's misrepresentation."

See also Jackson v. *M.F.A.,* supra, where the court stated at p. 391:

> "Where the policy itself negates the authority of an agent to waive its provisions, those who deal with such agents must determine at their own risk the extent of the agent's authority."
>
> * * * * *
>
> "The plaintiffs failed to sustain the burden of showing real or apparent authority upon the part of the defendant's agent, Pinkley, to waive the policy provisions or to accept notice on behalf of the company."

Since there is no possibility that the actions of ap-

pellant in taking the application and issuing the policy could constitute culpable negligence so as to bar equitable relief, we may be belaboring this question, but actually there isn't a scintilla of evidence from which negligence of any sort or nature could be inferred. The answers to the questions on the application were of such a nature that the policy was issued as a matter of course. It has been suggested that appellant should have made an independent investigation of defendant McKinzie, but was there any reason for making such investigation?

> "(a) Duty to check answers. No authority has been cited by defendants to support the proposition that there existed any 'duty' on the part of plaintiff to investigate the answers given in the West applications. On their face, they were entirely plausible, and bore no badge of fraud or deception. Plaintiff's underwriters testified that defendant's stated occupation was one as to which plaintiff's experience was average or better than average, and that in view of the answers given, there was no occasion to obtain a report by independent investigation, and that it was not the practice to do so.
>
> The court is not aware of any legal obligation on the part of an insurance carrier to assume that all applicants are untruthful and dishonest, and that no reliance can be placed upon anything they say. Stated differently, the court cannot conceive of a legal duty owing to defendant West to distrust him; or that the reliance by plaintiff on West's answers was a breach of duty toward *him. State Farm Mutual Auto. Ins. Co. v. West,* 149 F. Supp. 289, p. 301-302.
>
> "Appellants invoke the doctrine of estoppel to prevent the appellee from relying upon fraud or misrepresentation in the application for the insur-

ance. One ground of estoppel urged is that the appellee had constructive knowledge of the information available to it through the Department of Public Safety of Oklahoma; that a check of the record of the applicant for the insurance could and should have been made with such department, particularly in view of the statement contained in the application that the applicant had been arrested for a traffic violation; and that failure to make such investigation estops appellee. The duty to investigate where notice of a fact or facts indicate misrepresentation is a relative one depending upon the particular situation. But, absent exceptional or unusual circumstances, an insurer engaged in the business of issuing automobile liability insurance is not required in every case under peril of estoppel to make inquiry at the proper state agency with respect to official records throwing light upon the truth or falsity of the representation in the application that the driver's license of the applicant has never been revoked. And the statement in the application that the applicant had been fined $10.00 for running a red light, together with the further word of explanation that the light changed on him, did not require the insurer under pain of estoppel to make inquiry at the state agency or elsewhere as to whether the license of the insured had been revoked. The plea of estoppel upon the ground of failure to investigate was not well founded." *Adriaenssens v. Allstate,* 258 F.(2) 888, p. 890-891.

We contend that if negligence be a bar to the equitable relief requested by appellant that there is not a scintilla of evidence that appellant was negligent under any standard. Further, if this Court believes that appellant was negligent under some standard that this negligence was minor in character and not of such gravity as to be termed "culpable negligence."

Therefore as we have heretofore clearly demonstrated, since the appellant has conclusively proved all the elements necessary to entitle it to have the insurance policy declared null and void, and, since the alleged affirmative defense of negligence is untenable there was nothing for the jury to pass upon and appellant's motion for a directed verdict should have been granted.

II.

We believe that the trial court erred in failing to grant appellant's motion for a directed verdict and again when it failed to grant its motion for judgment n.o.v. so that it will not be necessary to consider the remaining Specifications of Errors. However, if we are in error in this respect it will be necessary for this court to consider whether the trial court erred in denying appellant's motion for a new trial (Specification of Error 3), which so far as this appeal is concerned is based on the failure of the court to withdraw the affirmative defense of negligence (Specification of Error 4) and in submitting negligence as an affirmative defense to be passed on by the jury (Specifications of Error 5). The instruction requested and the instruction given and the objections thereto are set forth in the foregoing Specifications of Errors totidem verbis and are also set forth in haec verba earlier in this brief when we discussed the second theory, i.e., negligence, on which the court submitted this case to the jury (Argument I). All of the cases cited and all of the arguments in support of our position that the alleged affirmative defense of

negligence should not have been submitted to the jury are equally applicable to these last three specifications of errors. We respectfully refer this court to the aforementioned portion of this brief to substantiate our position that the court erred in instructing the jury that common law negligence barred the equitable relief requested by appellant.

As the court submitted this case to the jury on the theory that appellees were entitled to prevail if appellant failed to establish the right to rescind or appellees established negligence appellant's motion for a new trial should have been granted since at least the theory of negligence was not a proper defense. *Nowery vs. Smith,* 69 F. Sup. 755, 759, affirmed 161 Fed. (2) 732.

"The trial judge is not obliged to charge the jury on a theory alleged in the pleading unless it is supported by substantial evidence. In fact it would be error to do so." *Lynch v. U. S.,* 73 F. (2) 316, 317.

Notwithstanding the fact that error is conclusively presumed, we honestly and sincerely believe that the instruction of the court in submitting the issue of negligence to the jury was extremely prejudicial to appellant. Assuming that the question of the right of appellant to rescind on the grounds of fraud on the part of McKinzie was an issue to be submitted to the jury, which, of course, the appellant does not concede, the evidence was so clear and convincing that defendant McKinzie acted fraudulently that it is hard to believe that a jury would not have held in favor of appellant on this issue. However, when we come to the question

of what constitutes due care we have a most nebulous standard. It would be easy for a jury, whose natural sympathies are with appellees Gilmont, to conjecture that the witness Snyder should have made more inquiries than he did or even that he should have asked questions not required by the application form, or that he should have done numerous other things, even though the procedure followed by the witness Snyder was standard procedure. In short, the evidence was so overwhelmingly in favor of the appellant it is hard to visualize a verdict other than for appellant were it not for the error of the court in submitting the issue of negligence to the jury.

We therefore submit that the court erred in failing to direct a verdict for appellant, and after the jury verdict the court erred in failing to set the verdict aside and enter judgment for the appellant notwithstanding the verdict, and finally in the event that this court is of the opinion that appellant was not entitled to a directed verdict, that the verdict heretofore entered in favor of appellee and against appellant should be set aside and a new trial granted.

Respectfully submitted,

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APPENDIX

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